OFFICE OF THE POLICE COMMISSIONER
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CHAN

December 2, 2008

Memorandum for: Deputy Commissioner, Trials

Re: **Police Officer Andre Menzies**
Tax Registry No. 927795
Housing Borough Bronx/Queens
Disciplinary Case No. 82691/07

The above named member of the service appeared before Assistant Deputy Commissioner David S. Weisel on October 15, 2007 and was charged with the following:

DISCIPLINARY CASE NO. 82691/07

1. Said Police Officer Andre Menzies, assigned to Police Service Area No. 9, while off duty, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: on February 27, 2006, said officer falsely reported his vehicle stolen to the New York City Police Department. (As amended)
P.G. 203-10, Page 1, Paragraph 5 **PROHIBITED CONDUCT**

2. Said Police Officer Andre Menzies, assigned as indicated above, while off duty, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: on March 20, 2006, said officer did file a fraudulent claim with his automobile insurance company. (As amended)
P.G. 203-10, Page 1, Paragraph 5 **PROHIBITED CONDUCT**

3. Said Police Officer Andre Menzies, assigned as indicated above, on December 5, 2006, did wrongfully and without just cause prevent or interfere with an official Department investigation, to wit: said officer stated that he had mistakenly used an incorrect address on an automobile insurance claim form, knowing that said statement was not in fact true. (As amended)
P.G. 203-10, Page 1, Paragraph 5 **PROHIBITED CONDUCT**

4. Said Police Officer Andre Menzies, assigned as indicated above, on December 5, 2006, did wrongfully and without just cause prevent or interfere with an official Department investigation, to wit: said officer stated that he did not enter his vehicle during the period it was vouchered and stored at the 105 Precinct, knowing that said statement was not in fact true. (As amended)
P.G. 203-10, Page 1, Paragraph 5 **PROHIBITED CONDUCT**

5. Said Police Officer Andre Menzies, assigned as indicated above, on or about and between April 23, 2005 and March 13, 2006, engaged in conduct prejudicial to the good order, efficiency and discipline of the Department in that he obtained insurance for his personal vehicle using an address in North Babylon, New York and had said vehicle registered to said address, when in fact he resided in Queens County. (As amended)
P.G. 203-10, Page 1, Paragraph 5 **PROHIBITED CONDUCT**

6. Said Police Officer Andre Menzies, assigned as indicated above, on or about and between April 23, 2005 and March 13, 2006, having changed said officer's residence, did fail and neglect to notify his Commanding Officer of his change of address by submitting form Change of Name, Residence or Social Condition (PD 451-021), as required. (As amended)
P.G. 203-18, Page 1, Paragraph 3 **RESIDENCE REQUIREMENTS GENERAL REGULATIONS**

7. Said Police Officer Andre Menzies, assigned as indicated above, on March 22, 2006, while on sick report, was wrongfully and without just cause absent from said residence for two and one half hours without permission of said officer's District Surgeon and/or Medical Sick Desk Supervisor. (As amended)
P.G. 205-01, Page 2, Paragraph 4 **REPORTING SICK**

8. Said Police Officer Andre Menzies, assigned to Police Service Area No. 9, while off duty, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: on or about and between February 28, 2006 through December 5, 2006, said officer did wrongfully use his Department issued parking permit No. 8090158 for his 1998 Chevrolet Blazer, license plate No. CK9915, in a vehicle or vehicles that the permit was not assigned to without permission or authority to do so. (As amended)
P.G. 203-10, Page 1, Paragraph 5 **PROHIBITED CONDUCT**

In a Memorandum dated July 3, 2008, Assistant Deputy Commissioner Weisel found the Respondent GUILTY of Specification Nos. 6, 7 and 8 and Not Guilty of Specification Nos. 1, 2, 3, 4 and 5. Having read the Memorandum and analyzed the facts of these instant matters, I approve the findings, but disapprove the penalty.

The Respondent was found guilty of engaging in separate and distinct acts of misconduct during an extended period of time. As such, a more severe penalty than what was recommended after trial is merited. Therefore, Respondent Menzies is to forfeit 20 Vacation days.

Raymond W. Kelly
Police Commissioner

The City of New York

POLICE DEPARTMENT

July 3, 2008

MEMORANDUM FOR: POLICE COMMISSIONER

Re: Police Officer Andre Menzies
Tax Registry No. 927795
Housing Borough Bronx/Queens
Disciplinary Case No. 82691/07

The above-named member of the Department appeared before me on October 15, October 18, October 25, November 15, and November 16, 2007, charged with the following:[1]

1. Said Police Officer Andre Menzies, assigned to Police Service Area No. 9, while off duty, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: on February 27, 2006, said officer falsely reported his vehicle stolen to the New York City Police Department. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

2. Said Police Officer Andre Menzies, assigned as indicated above, while off duty, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: on March 20, 2006, said officer did file a fraudulent claim with his automobile insurance company. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

3. Said Police Officer Andre Menzies, assigned as indicated above, on December 5, 2006, did wrongfully and without just cause prevent or interfere with an official Department investigation, to wit: said officer stated that he had mistakenly used an incorrect address on an automobile insurance claim form, knowing that said statement was not in fact true. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

4. Said Police Officer Andre Menzies, assigned as indicated above, on December 5, 2006, did wrongfully and without just cause prevent or interfere with an official Department

[1] The record was kept open until January 30, 2008, for the submission of written summations.

investigation, to wit: said officer stated that he did not enter his vehicle during the period it was vouchered and stored at the 105 Precinct, knowing that said statement was not in fact true. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

5. Said Police Officer Andre Menzies, assigned as indicated above, on or about and between April 23, 2005 and March 13, 2006, engaged in conduct prejudicial to the good order, efficiency and discipline of the Department in that he obtained insurance for his personal vehicle using an address in North Babylon, New York and had said vehicle registered to said address, when in fact he resided in Queens County. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

6. Said Police Officer Andre Menzies, assigned as indicated above, on or about and between April 23, 2005 and March 13, 2006, having changed said officer's residence, did fail and neglect to notify his Commanding Officer of his change of address by submitting form Change of Name, Residence or Social Condition (PD 451-021), as required. *(As amended)*

P.G. 203-18, Page 1, Paragraph 3 – RESIDENCE REQUIREMENTS – GENERAL REGULATIONS

7. Said Police Officer Andre Menzies, assigned as indicated above, on March 22, 2006, while on sick report, was wrongfully and without just cause absent from said residence for two and one half hours without permission of said officer's District Surgeon and/or Medical Sick Desk Supervisor. *(As amended)*

P.G. 205-01, Page 2, Paragraph 4 – REPORTING SICK

8. Said Police Officer Andre Menzies, assigned to Police Service Area No. 9, while off duty, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: on or about and between February 28, 2006 through December 5, 2006, said officer did wrongfully use his Department issued parking permit No. 8090158 for his 1998 Chevrolet Blazer, license plate No. CK9915, in a vehicle or vehicles that the permit was not assigned to without permission or authority to do so. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

The Department was represented by Krishna O'Neal, Esq. and Daniel Maurer, Esq., Department Advocate's Office, and the Respondent was represented by Michael Martinez, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Not Guilty of Specifications 1, 2, 3, 4, and 5. He is found Guilty of Specifications 6, 7, and 8.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Police Officer John Falcone, Sergeant Paul Valerga, Sergeant Jeffrey Rosenthal, Lieutenant Scott Rubinson, James Whitaker, and Police Officer Robert Rizzotto as witnesses.

Police Officer John Falcone

Falcone is currently assigned to the 105 Precinct. He testified that at approximately 6:00 p.m. on March 11, 2006, he and his partner responded to a radio run involving a suspicious vehicle on the side of the road at 131st Avenue and Laurelton Parkway in Queens County. Falcone described the location as an area known for the dumping of stolen vehicles. Upon his arrival at the scene, Falcone observed damage to the vehicle's steering column. He explained that the car was locked, but he was able to see that the wires in the steering column and the lock cylinder were exposed. He could not recall whether or not the wires appeared to have been detached. Falcone also observed fire damage to the dashboard, which was melted. The windows

were hazy but unbroken. When Falcone ran the license plate number, he learned that the vehicle had been reported stolen. He proceeded to have the vehicle towed. Department's Exhibits (DX) 1 and 2 are copies of a Property Clerk's Motor Vehicle/Boat Invoice and Complaint Follow-Up Worksheet that Falcone prepared for the recovered vehicle, a 1998 Chevy Blazer registered to the Respondent.

On cross-examination, Falcone testified that he could not say how long the Respondent's car sat at 131st Avenue and Laurelton Parkway before it was recovered on March 11, 2006. Although Falcone could not specifically remember the last time he drove down that street, he drove that way fairly frequently. The individual who placed the initial "suspicious vehicle" call to the police stated that the car had been parked at that location for a while, but Falcone did not recall seeing the car there before. According to Falcone, had he seen the Respondent's car earlier, he would have probably stopped to investigate it. The car was parked legally, and Falcone believed that the registration and inspection were up to date. When Falcone looked into the car, he did not see any Department-related material. The car was towed to a storage facility, known as the Carriage House.

Sergeant Paul Valerga

Valerga is currently assigned to the Internal Affairs Bureau (IAB). He previously worked in the Manhattan South Auto Larceny Unit and has attended Auto Crime School, a four-day course given by the Auto Crime Division. In addition, he attended two Department of Motor Vehicles courses on subjects such as fraudulent documents and what to look for when dealing with possibly stolen cars. He stated that he is familiar with the vehicle and property insurance industry because he once worked for a year as a case manager in an insurance firm.

On March 17, 2006, Valerga was assigned to investigate an allegation of misconduct involving the Respondent's car, which had been reported stolen on February 27, 2006. During the course of his investigation, Valerga learned that while the Respondent was licensed to drive at 101-62 124th Street in Richmond Hill (Queens), the Respondent's vehicle was registered at 120-34 230th Street in Cambria Heights (Queens) and insured at 198 Bay Shore Road in North Babylon (Suffolk County). The Richmond Hill address was the one that the Respondent had on file with the Department, and Valerga learned that the Respondent's parents lived at that residence. Meanwhile, the Respondent's wife, Natacha, lived at the Cambria Heights address with her parents, and the Respondent's in-laws owned the North Babylon residence. According to Valerga, the Respondent was out of residence while on sick leave on March 22, 2006.

Valerga reviewed the Complaint Report Worksheet that was prepared when the Respondent reported his car stolen (DX-3, Complaint Report Worksheet). According to the report, the car was stolen at some point between 11:00 p.m. on February 26, 2006, and 6:00 a.m. on February 27, 2006, from in front of 101-39 124th Street. The police officer who prepared the report noted that there was no sign of forced entry into the vehicle.

Photographs were taken of the Respondent's car after it was recovered. Valerga reviewed these photographs (DX 4a-4n). DX-4a is a photograph taken from a distance of the vehicle in its entirety. DX-4b is a photograph of the vehicle's side. In this photograph, some damage to the vehicle's front is apparent. DX-4c is a photograph of the vehicle's rear hatch compartment, throughout which papers are scattered. DX-4d is a photograph of the car's roof rack and gas cap. DX-4e is a photograph of the driver's side and rear seats. In this photograph, it is apparent that the steering column is broken and that papers are scattered throughout the car. DX-4f is a photograph of the interior of the car from the perspective of the rear hatch area. DX-

4g is a photograph of the floorboards of the passenger compartment, where some fire damage can be seen. DX-4h is a photograph of the interior roof rack, where more fire damage can be seen. DX-4i is a photograph of fire damage to the front seat and steering wheel. This photograph also shows rips in the leather of the driver's seat. DX-4j shows that the steering column is cracked and broken. DX-4k & *l* are photographs of a plastic Poland Spring water bottle that was allegedly used to store gasoline that may have been used to set the car on fire. DX-4m is a photograph of a Patrolmen's Benevolent Association (PBA) magazine that was found in the car. DX-4n is a photograph of a PBA planner and other miscellaneous papers that were also found in the car. According to Valerga, it was determined that the Respondent's vehicle was the object of arson.

As part of his investigation, Valerga contacted Geico, the Respondent's vehicle insurance carrier. Valerga received from Geico a copy of the Vehicle Theft Questionnaire that was prepared by the Respondent on March 20, 2006 (see DX-5, Questionnaire). Valerga explained that a copy of this questionnaire must be submitted by all insurance claimants in theft cases.

On the questionnaire, the Respondent gave the North Babylon address as his current residence and the Richmond Hill address as his previous residence. The questionnaire was notarized and, in the notary section, the Respondent used the Cambria Heights address. The Respondent noted on the questionnaire that there was only one set of keys for the car, nobody had an extra set of keys, there were no keys missing, no keys were stored in or upon the vehicle, the car was locked at the time of the theft, and the alarm was in use. The Respondent also noted that neither he nor any member of his family ever had a vehicle stolen before.

Valerga also received from Geico the transcript of a telephone interview that James Whitaker, a member of the insurance company's fraud department, conducted with the Respondent on April 5, 2006 (DX-6, transcript of recording of interview).

In the interview, the Respondent stated that he had been living at the Cambria Heights address for approximately two years, but on the night of the theft the car was parked five or six houses from the Richmond Hill address. He explained that his mother and children live at the Richmond Hill address, and he was spending the night there on February 26, 2006. The Respondent also stated in the interview that there was a built-in factory alarm in the car, and he had only one set of keys for the car. In this interview, the Respondent stated that the car had been stolen once before. He explained that a year or a year and a half earlier, the car was stolen from in front of his command when he ran inside to drop off some papers and left the car running. The car was later recovered without any damage, but the keys and some documents were taken from the vehicle.

Upon review of the interview transcript, Valerga testified that he thought it was strange that the Respondent lived at the Richmond Hill address for 20 years but could not recall the specific house that the car was parked in front of. Valerga also thought it was strange that the car was not damaged at all the first time that it was stolen.

Valerga also received from Geico a copy of a photograph of the inspection sticker that was affixed to the Respondent's windshield (DX-7, photograph of sticker). The sticker indicates that the inspection expired on October 22, 2005. Valerga testified that in insurance fraud investigations, an expired inspection could be a sign of serious problems with a vehicle.

Valerga learned that Geico initially intended to pay the Respondent a settlement that would allow the Respondent to fix the car. After receiving a telephone call from the Respondent,

however, the insurance company declared the vehicle a total loss. In his telephone call, the Respondent demanded that the vehicle be declared a total loss because he found smoke damage that was not listed on the insurance company's estimate report.

DX-8 is a copy of the Geico Estimate Report that was prepared for the Respondent's car on March 22, 2006. The report indicates that the Respondent should receive $2931.15 to fix the vehicle. DX-9 is a copy of Geico's final claim payment for the car. It is dated July 10, 2006, and it indicates that the insurance company ultimately paid the Respondent $5,699.55.

Valerga testified that based on the nature of the damage, Geico hired an independent investigator, Glenn Hennings, to conduct a forensic evaluation on the Respondent's car. Valerga received from Geico a copy of the resulting forensic evaluation report.

DX-10 is a copy of the forensic evaluation report performed by Glenn Hennings of Sterling Investigative Services, dated March 28, 2006.[2] In the report, Hennings noted the expired inspection sticker. He also noted upon review of the car doors that the left dust shutter was missing, the left face cap was destroyed, and the left release handle exhibited tool marks. According to Hennings, however, the damage to the door was cosmetic in nature, and there was no evidence of the locking mechanism having been tampered with. In fact, Hennings did not find any indication of forced entry. Upon examination of the steering column and ignition lock, Hennings noted that the lower half of the steering column was cracked and missing. The ignition, however, remained locked and secured, and there was no evidence of hotwiring. Hennings also noted in a section of the report entitled "Anti-Theft System" that the vehicle was equipped with Passlock 1, which is a factory-installed anti-theft system that uses magnetic and resistance based technology. Hennings explained in this section that sensors in the lock "deter

[2] Hennings was uncooperative with the Department Advocate's Office and was ultimately issued a subpoena to appear at trial. Hennings did not comply with the subpoena (see p. 51, infra).

forced rotation and extraction type attacks." Hennings could not actually test this system, but he found no evidence that the system was tampered with. Hennings ultimately concluded that a key with the correct combination of cuts would have been required to operate the vehicle.

Valerga testified that the observations made by Hennings in the forensic evaluation report were consistent with a conclusion that the door and steering column were intentionally damaged to make it appear as if somebody gained entry into the vehicle by sticking a crowbar or screwdriver into the door cylinder and then hotwired it.

Valerga testified that on April 5, 2006, he went to the location where Falcone recovered the Respondent's car. He knocked on doors in the area and spoke with the neighborhood letter carrier to see if anybody remembered the Respondent's vehicle. According to Valerga, most people did not remember the car, and no one recalled seeing anybody leave the car at that location. Although the location was in Queens, the parkways in the area gave it easy access to both Brooklyn and Nassau County. According to Valerga, many arrestees have explained to him that easy access to county lines is something that they look for. Valerga stated that the recovery location was just over a mile away from the Respondent's Cambria Heights address, the house where the Respondent's in-laws live. Valerga explained that proximity is something that an individual dumping a car would probably look for.

DX 13 and 14 are maps of the area in Queens where the Respondent's car was recovered. Valerga marked on the maps the recovery location and the location of the Cambria Heights residence. DX-11 consists of photographs taken by Valerga of the recovery location.

Valerga also went to the Respondent's North Babylon residence and interviewed neighbors there. Neighbors reported to Valerga that the house had been vacant for approximately two years, but a black male entered the house on weekends from time to time.

Valerga testified that he learned in his investigation that somebody called Geico in April 2005 and had the address on the Respondent's insurance policy changed to the North Babylon address. The Respondent received a North Babylon insurance rate for a period of approximately one year. DX-12 consists of photographs that Valerga took of the North Babylon residence.

Valerga testified that the history on the Respondent's car showed that it had, in fact, been reported stolen from in front of the Respondent's command approximately a year and a half before the February 2006 incident. The history also showed that the car had been involved in three or four accidents. Valerga rated the car's condition as "poor to slightly better than poor." He explained that the car had a scrape, and dents all over. The car also had over 100,000 miles on it. Valerga looked the car up in Kelly's Blue Book, which indicated that the car would have been worth approximately $6,000 if it were in excellent condition. Because it was not in excellent condition, however, Valerga estimated that the Respondent's car was worth $2,500.

Valerga conducted an Official Department Interview with the Respondent on December 5, 2006. Lieutenant James Micozzi also participated in the interrogation of the Respondent (see DX-15a, interview tape; DX-15b, transcript). When Valerga asked in the interview where the Respondent lived, the Respondent replied that he lived in several different locations, including the Richmond Hill and Cambria Heights addresses. Valerga indicated that the Respondent told him that he never informed his Commanding Officer that he does not have one steady residence.

When Valerga asked the Respondent about being out of residence on March 22, 2006, the Respondent replied that he had a doctor's appointment that day but did not notify the Sick Desk before leaving home. He called the Sick Desk only after he was informed from somebody at home that the Department was looking for him. The Respondent told Valerga that his cell phone

was not working before he left the Cambria Heights residence that morning and he never used the landline in that house.

In the interview, the Respondent stated that his mother was the actual owner of the stolen vehicle, his name was on the title and registration, and Natacha's name was on the insurance policy.[3] The Respondent also stated that although his in-laws own a house in North Babylon and he and Natacha plan to eventually move there, he never garaged the vehicle at that address.[4] According to the Respondent, Geico made a mistake when it listed the North Babylon address as the rate location.

The Respondent told Valerga that he could not recall exactly where he parked his car on the night of February 26, 2006, but it was six or seven houses down from his mother's house. Prior to that night, the Respondent had removed from the car his Department-issued parking placard and was utilizing it in another vehicle. The Respondent stated in the interview that he never loaned the car to anybody or made a copy of the car key. He further stated that the car alarm was working properly. During the interview, Valerga asked the Respondent three times if he went inside the car while it was being safeguarded for investigation. The first two times, the Respondent denied entering the car. Only after being asked the third time did the Respondent admit that he did, in fact, go inside the vehicle.

After informing the Respondent of Hennings' forensic evaluation results, Valerga asked the Respondent if he falsely reported his vehicle stolen to the Department. The Respondent answered this question affirmatively. At that point in the interview the Respondent's attorney asked for a recess. When the interview resumed, the Respondent stated that he had misinterpreted Valerga's question about the false report.

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[3] Valerga testified that he has always been under the assumption that insurance policies in women's names get cheaper rates than policies in men's names.

[4] Valerga explained that a vehicle insurance rate is dependant on the car's primary storage location.

In February 2006, the Respondent was approximately $45,000 in debt. Valerga learned that the Respondent had several outstanding loans before joining the Department, and had since taken out a pension loan.

On cross-examination, Valerga testified that each Department parking placard is issued for a specific vehicle. He explained that the placards are issued so that members of the service can find parking at work. A police officer can get in trouble for utilizing his parking placard while off duty. Valerga stated that placards must be safeguarded at all times, but he believed that placards are supposed to remain in the car. He further stated, however, that it is possible an officer can take his placard out of the car every night to prevent the placard from being stolen in the event that the car is broken into.

Valerga reiterated that the Respondent's car key was equipped with a computer chip. He stated that he learned from an owner of a Valley Stream Chevrolet dealership that since a copy of the key would not have the computer chip, a copy could open the car doors but would not be able to start the ignition. While a car could be started by hotwiring, hotwiring requires the wires inside the steering column to be snipped. The wires inside the Respondent's steering column were still intact when the car was recovered by Falcone. Valerga stated that besides the computerized key and hotwiring, there were other ways that the car could have been started. It is also possible that the car was towed.

Upon the completion of his investigation, Valerga reported his findings to the Integrity Division at the Queens District Attorney's Office. According to Valerga, the DA's Office declined to prosecute the Respondent because Geico did not contest the Respondent's insurance claim, and thus would not be a complaining witness. Valerga added that not only did Geico opt to pay the Respondent's claim, but the Respondent still uses Geico car insurance to this day.

Valerga stated that he does not know what standard of proof Geico uses in determining whether or not to contest a claim.

Valerga testified that a Poland Spring water bottle containing accelerant was found in the Respondent's car. It is believed that the accelerant was used to set fire to the car.

Valerga testified that because the Department suspected the Respondent of misconduct, the Respondent was not immediately notified of the vehicle's recovery. According to Valerga, the Respondent told Whitaker in the April 5, 2006, telephone interview that he lived in Cambria Heights and spent time in Richmond Hill. At no point in that interview did the Respondent claim that he lived in North Babylon. According to Valerga, the Respondent stated in the December 5, 2006, Official Department Interview that he lived at the Richmond Hill address for 22 years, his parents still live there, and his three daughters from his first wife also live there. After the Respondent's first wife died, the Respondent took his young daughters and moved back to his parent's Richmond Hill house. Valerga learned from his investigation that years later the Respondent remarried and had two children with his second wife, Natacha. Natacha lives with those two children in her parent's Cambria Heights home. The Respondent told Valerga that relatives purchased the North Babylon house for the Respondent's family to use. The Respondent spent months working on that house to make it livable. The Respondent and his brother-in-law went to the North Babylon house on weekends to do work on it.

Valerga testified that the Respondent has on average been rated between "Competent" and "Highly Competent" on annual performance evaluations. Valerga stated that there is not anything unusual about a police officer taking out a pension loan.

Valerga learned in his investigation that when the Respondent's car was stolen the first time, the perpetrator was caught on videotape. The vehicle was recovered several hours later in

Brooklyn without any keys. Documents with the Respondent's address were also taken from the car. The perpetrator was not apprehended. Valerga stated that it was possible that the perpetrator who stole the Respondent's vehicle the first time found the car at the Respondent's address and used the key he had taken to steal the car a second time in February 2006.

At one point, Valerga ordered an integrity test to be conducted on the Respondent. The test involved the placement of money in a Department car to which the Respondent was assigned. The Respondent reported the money and passed the test.

Valerga testified that he did not know how long the Respondent's car sat at 131st Avenue and Laurelton Parkway before it was recovered on March 11, 2006. Valerga explained that proximity to a "home base" is something that an individual dumping a car would want in order to get away from the car as quickly as possible. Valerga reiterated that the recovery location was just over a mile from the Respondent's Cambria Heights address.

Valerga testified that the Respondent should have informed his Commanding Officer that he was not residing full-time at the Richmond Hill address and was living elsewhere part of the time. According to Valerga, the fact that the Respondent was splitting his time between the Richmond Hill and Cambria Heights addresses for a period of more than two years was something that the Department should have been made aware of. Valerga stated that it would have been different had the Respondent's living situation not been so permanent. Valerga stated that although the Department's Change of Name, Residence or Social Condition Form has space for only one address, when the Respondent applied to the Department he "signed his PA-15, a handwritten letter" in which he acknowledged that he must notify his Commanding Officer of any change of residence.

Valerga testified that the Respondent's Official Department Interview lasted more than two hours, including breaks. The Respondent mentioned during the interview that he did not understand some questions. The Respondent was yelled at by his own attorney a couple of times to pay attention to the questions.

Valerga conceded that he was not certain who actually placed the telephone call to Geico about switching the address to North Babylon. He further conceded that it would be significant to know whether it was the Respondent or Natacha who made that call. The Respondent told Valerga that Natacha handled all of the insurance information. The Respondent also told Valerga that at one point Natacha gave him an insurance card, and he proceeded to put the card away without even reading it. Valerga testified that in March 2006, two days after the Respondent's car was recovered, Natacha called Geico to have the insurance address changed from North Babylon back to Cambria Heights. Geico did not tell Valerga anything about sending Natacha a letter on March 8, 2006, to inform her that she had mistakenly been receiving the North Babylon insurance rate instead of the Cambria Heights rate. Valerga stated that he did not know whether or not Geico requires policyholders to submit proof of address when requesting that their insurance rates be reduced due to a move.

Valerga testified that Specification 4 is based on the Respondent, during the Official Department Interview, falsely giving information that could have been pertinent to the investigation. Valerga knew that at some point prior to the interview, the Respondent told Geico that he had entered the vehicle and noticed the extent of the smoke damage. Valerga explained that this is the reason he repeated his question to the Respondent after the Respondent initially denied entering the car while it was being safeguarded for investigation. According to Valerga, the Respondent admitted that he entered the car only after Valerga told him that he had proof of

the entrance. This admission took place a couple of minutes after the line of questioning began. The Respondent then answered affirmatively when Valerga asked if he was aware that by entering the car he could have impeded an investigation by smudging fingerprints. Valerga did not know if the car was open when the Respondent went to look at it.

Valerga testified that during the course of the interview the Respondent maintained that he had nothing to do with the theft of his vehicle. Valerga was, therefore, a little surprised when he asked the Respondent if the Respondent had falsely reported the vehicle stolen and the Respondent answered affirmatively. According to Valerga, he specifically instructed the Respondent to think before answering the question, and the Respondent paused for approximately eight seconds before offering his response. Valerga reiterated that the Respondent changed his answer after speaking with his attorney. Valerga admitted that often during the interview, Valerga cut off the Respondent while the Respondent spoke.

On redirect examination, Valerga testified that the Respondent conceded in his interview that he was responsible for the address on the insurance policy even though it was Natacha who actually handled the insurance information. The Respondent told Valerga in the interview that Geico somehow learned that the Respondent and Natacha were planning on eventually moving to North Babylon, and the insurance company at that point mistakenly started to use the North Babylon address as the insurance location.

Valerga stated that he did not think the Respondent's car was stolen by tow or by the perpetrator who had previously stolen it since neither of these scenarios explains the effort to make it appear as if the car had been forcibly broken into and hotwired.

On recross-examination, Valerga testified that he had videotapes on the table during the Respondent's interview. Valerga conceded that the tapes were there to trick the Respondent.

Valerga did not actually have any tapes from the 105 Precinct, but he wanted the Respondent to believe that he possessed evidence against him.

Valerga stated that it was possible that the perpetrator who had previously stolen the Respondent's car stole it again in February 2006 and then dumped it at 131st Avenue and Laurelton Parkway. At that point, somebody else could have come across the car and committed the damage.

On continued redirect examination, Valerga testified that it was unlikely that the perpetrator who stole the Respondent's car the first time would hold on to the Respondent's car key for a year and a half. He explained that a perpetrator in that situation would not want to hold on to incriminating evidence for very long.

Upon questioning by the Court, Valerga testified that a car door could be opened by removing the door cylinder, using a crowbar, or using a slim jim.

Sergeant Jeffrey Rosenthal

Rosenthal, who is currently assigned to IAB, was formerly assigned to the Medical Division's Absence Control Unit. He explained that if a member of the service is on sick leave and wants to leave home, that member must call the Sick Desk and have himself placed in the Out-of-Residence Log. The call must be made before the member leaves home. Members of the service with certain types of injuries or illnesses, however, are sometimes issued a pass which allows them to leave home for a set period of time each day without calling in at all.

On March 22, 2006, Valerga requested that Rosenthal visit the Respondent's residence. At approximately 10:15 a.m. that day, Rosenthal went to the Richmond Hill address that the Respondent had listed with the Sick Desk when his sick leave commenced. The Respondent's

father, Robert, answered the door and told Rosenthal that he threw the Respondent out of the house for being dishonest. Robert also told Rosenthal that the Respondent had not been present in the house for over a month. Rosenthal left his business card with Robert.

Rosenthal then checked to see if the Respondent had at some point changed his address with the Sick Desk. Rosenthal learned that the Respondent had, in fact, changed his address to the Cambria Heights residence. At approximately 11:00 a.m., Rosenthal arrived at this second residence. A female black answered the door and refused to speak with Rosenthal. Several minutes later, Rosenthal received a telephone call from his supervisor. The supervisor informed him that the Respondent had just called to explain that he had been out of residence since 7:30 a.m. that day for a doctor's appointment. Rosenthal stated that the Respondent did not put himself in the Out-of-Residence Log before leaving home.

On cross-examination, Rosenthal testified that he did not know exactly when the Respondent changed his sick address from Richmond Hill to Cambria Heights or if the Respondent had been granted a pass to be out of residence.

Lieutenant Scott Rubinson

Rubinson, a 25-year member of the Department, is currently assigned to the 100 Precinct. He spent six years as a supervisor in the Queens South Evidence Collection Team (ECT), where he was responsible for reviewing case folders for accuracy. Between 50 and 75 cases that he handled each year involved recovered vehicles. Rubinson received training in photographing evidence. In addition, he received through the Nassau County Fire Department training on the subject of identifying fire damage.

While assigned to ECT on March 17, 2006, Rubinson and Police Officer Warren Davis processed the Respondent's vehicle at the Carriage House, a private facility located within the confines of the 107 Precinct. Rubinson explained that Davis dusted the vehicle for latent fingerprints and packaged the Poland Spring bottle that was found inside the car. Davis also took photographs (DX 4a-4n).

Rubinson had been informed by Police Officer Robert Rizzotto of the 105 Precinct that the Respondent's vehicle was a case of possible insurance fraud. Rubinson testified that based on his own observations of the car he reached the same conclusion. He specified that his conclusion was based on his observations of the fire damage, the ignition, the inspection sticker, and the fact that the car had a lot of miles on it. Rubinson testified that the fire did not have enough oxygen to burn for long because the car windows were shut. This showed, according to Rubinson, that the fire had been set by somebody who did not have experience with fire. Rubinson stated that although the bottom portion of the steering column had been removed, the wires were not cut or damaged and the ignition mechanism seemed to be intact. Because the ignition was intact, according to Rubinson, it would have been hard for a thief to move the vehicle. Rubinson also noted that no parts had been removed from the car, not even the radio or airbags. Rubinson did not recall the condition of the door cylinders. DX-16 is a copy of the ECT worksheet prepared for the Respondent's car.

On cross-examination, Rubinson testified that if the Respondent's car was towed to the Carriage House on March 11, 2006, it would have spent six days at the Carriage House by the time that Rubinson and Davis processed it. During that period, nobody from the Department would have been watching the car. Rubinson explained that while Carriage House personnel normally do not enter the cars, he did not know for certain whether or not anybody had entered

the Respondent's vehicle. When Rubinson and Davis arrived at the car, the doors were unlocked. Rubinson did not know who unlocked the car.

Rubinson testified that when he noticed in the car a PBA planner and a "City of New York" envelope addressed to "P.O. Menzies," he realized that he was dealing with a vehicle that belonged to a member of the service. At that point, Rubinson notified IAB. No fingerprints were successfully lifted from the car or the Poland Spring bottle.

Upon questioning by the Court, Rubinson testified that it is common for smoke damage to affect the viability of latent prints left in the interior of a vehicle. Similarly, extended exposure to the elements impacted the ability to pick up prints on the vehicle's exterior.

James Whitaker

Whitaker is currently employed as a theft examiner for Geico. Prior to joining Geico five years ago, he served 20 years as a member of this Department. For 16 of those years, he was assigned to the Criminal Justice Bureau and worked out of the Brooklyn District Attorney's Office. Whitaker testified that he received over a hundred hours of classroom instruction in his training as a theft examiner. He has certifications to process insurance claims in New York, New Jersey, and all of New England.

Whitaker testified that every insurance claim for a stolen car is forwarded to his unit. In each stolen car case, the claimant must prepare a Vehicle Theft Questionnaire and a telephone interview is conducted. The questionnaire and interview are then reviewed to determine if the information provided by the claimant is valid and consistent. If the information is found to be suspicious for any reason, the case gets passed on to Geico's Special Investigation Unit for further field investigation, or a forensic evaluation is conducted. Whitaker explained that he

requests that forensic evaluation be conducted in cases involving suspected arson or locks that were dubiously tampered with. All of the forensic evaluators that Geico hires are trained and accredited. Geico management makes the ultimate decision on whether or not to pay on a claim. Whitaker stated that in New York State, an insurance company has 25 days from the time a car is reported stolen to either pay on the claim or provide the claimant with specific reasons for not paying.

Whitaker testified that the Respondent reported his insurance claim to Geico on February 27, 2006. Whitaker called Natacha that day because she was the named policyholder. Natacha instructed Whitaker to speak with her husband instead. Whitaker then called the Respondent, but the Respondent was unable to speak at the time because he was at work. After Whitaker received notification that the Respondent's car had been recovered, Whitaker contacted the Respondent again. The Respondent subsequently prepared a Vehicle Theft Questionnaire. Upon review of the questionnaire, Whitaker noticed that the Respondent listed a Suffolk County (North Babylon) address as his current residence and a New York City telephone number. The Respondent also listed a Queens address in the questionnaire's notary section. In addition, the Respondent indicated on the questionnaire that he had never before had a vehicle stolen. Whitaker explained that this was unusual because in his subsequent telephone interview with the Respondent, the Respondent stated that his car had, in fact, been stolen once before.

Upon review of a document (DX-17) that was prepared by a Geico underwriter, Whitaker testified that on April 23, 2005, the Respondent's vehicle started to receive an insurance rate based on the North Babylon address. In March 2006, the rate address was changed back to the Cambria Heights address.

Whitaker requested that Hennings (the private forensic investigator, see p. 8, supra) conduct a forensic evaluation of the Respondent's vehicle. Whitaker utilized the resulting forensic evaluation report in his examination of the Respondent's insurance claim. Whitaker testified that he found several "red flags" in Hennings' report. These red flags included Hennings' finding that the fuel port was not a source of the fire; that the bottom of the steering column was broken but there was no indication that the car had been hotwired; that the tampering to the door lock and ignition was purely cosmetic in nature; that the steering column was locked and the mechanism holding the steering wheel was not broken or damaged; and that the inspection sticker was expired.

Whitaker explained that the finding that the fuel port was not a source of the fire indicated that the Respondent's case involved arson. Moreover, the fact that the car doors and windows were closed signified that the fire was set by an "amateur arsonist." Whitaker stated that, based on his experience, this is an indication of fraud.

As for the damage to the steering column, Whitaker explained that the damage seemed to be done just to make it appear as if the car had been hotwired. In addition to the forensic evaluation report, Whitaker reviewed photographs (DX 18-19) of the car's steering column. In the photographs, the ignition appeared undisturbed and the wires appeared intact.

As for the tampering to the door lock and ignition, Whitaker explained that the cosmetic nature of the tampering indicated that the vehicle got to the dumping location in one of two ways: either it was towed there or somebody with a key drove it there. Whitaker had previously been told by the Respondent that there was only one set of keys for the car.

Whitaker explained that the finding that the steering wheel was locked and the mechanism holding the wheel was neither broken nor damaged indicated that the transmission

was locked and that, therefore, the car could not have been easily towed since the rear wheels would not have turned. According to Whitaker, towing would have left skid marks at the scene. Even if the car had been towed on a flatbed truck, the perpetrator would not have been able to freely roll the car on and off of the truck. Whitaker concluded that the vehicle was driven to the dumping location and the ignition was then shut off.

Whitaker explained that the fact that the inspection sticker had been expired for approximately four months at the time that the theft was reported could have been an indication of a car owner who wanted to dispose of his car. The inspection sticker indicated that the car had 118,784 miles on it.

Whitaker testified that, based on the Hennings report, he had doubts as to the validity of the vehicle's theft. He, therefore, recommended that the Respondent's claim proceed to an Examination Under Oath, a Geico procedure that would have involved the Respondent being questioned by a company attorney. Although Whitaker did not recommend that the insurance company pay out on the Respondent's claim, it is Geico management that makes the final determination on whether or not to pay in any given case. According to Whitaker, the insurance company initially decided to pay the Respondent money to repair his car. The Respondent did not, however, agree with the settlement offer since he believed that the car was beyond repair. Whitaker did not recall the Respondent ever indicating that he observed the car after it was recovered by the Department. Geico ultimately classified the Respondent's car as a total loss.

On cross-examination, Whitaker testified that he never personally examined the Respondent's car. On between ten and twenty occasions, he spoke with Valerga about the Respondent's case. Whitaker described himself as a meticulous note-taker.

Whitaker never met Hennings in person, but they have spoken to each other on the telephone. Whitaker never investigated Hennings's credentials, which include being a certified forensic locksmith, registered safe technician, certified foreign car locksmith, certified General Motors steering column technician, and a forensic technician. Whitaker himself does not have any of these credentials.

Whitaker testified that insurance rate is dependent on where the vehicle is garaged. Because the Respondent used multiple addresses on his insurance paperwork, Whitaker suspected that the Respondent was using an address different from the address at which the car was actually garaged in order to receive a lower insurance rate. Whitaker stated that the garage address does not have to be the same as the policyholder's mailing address. For a policyholder to change from an address with a higher rate to one with a lower rate, he would have to submit to the insurance company a utility bill for the new address. Whitaker reiterated that the Respondent's vehicle was initially insured at the Cambria Heights address, later switched to the less expensive North Babylon address, and then ultimately changed back to Cambria Heights. These calls to have the address changed would have been handled by Geico's customer service department. Whitaker stated that he did not know who actually placed the calls to Geico to have the policy changed from one address to another, and he never told Valerga that the Respondent was personally responsible for the calls. Whitaker testified that he has no evidence that proof of an address change (such as a utility bill) was ever submitted to the insurance company in the Respondent's case. Whitaker clarified that proof is always necessary when making a change of address that affects insurance rate, but proof is not necessary in other address-change situations.

Whitaker reiterated that on the Vehicle Theft Questionnaire, the Respondent listed the North Babylon address as his current residence. According to Whitaker, the North Babylon

address was, in fact, the Respondent's mailing address at the time, as well as the address on the Respondent's insurance card. Whitaker explained that a policyholder's insurance card always contains the mailing address. One cannot, therefore, tell from looking at the card which address is being used to calculate the insurance rate.

In the April 5, 2006, telephone interview, the Respondent told Whitaker that he was currently residing at the Cambria Heights address. It was when Whitaker asked in the same interview how many sets of keys existed for the car that the Respondent immediately volunteered that the car had previously been stolen. According to Whitaker, the Respondent should have also reported the previous theft on the Vehicle Theft Questionnaire even though the car had been recovered on the same day that it was stolen and the Respondent never filed an insurance claim for that incident. Whitaker stated, however, that it would be more important for an investigator to know if an individual has previously submitted an insurance claim for a stolen car than to know if a car had been stolen but no insurance claim was submitted for it. There is no space on the Vehicle Theft Questionnaire to explain that distinction.

Whitaker testified that Geico management did not follow his recommendation that the Respondent be subjected to an Examination Under Oath. He stated that he never told Valerga that the Respondent went inside the car while the car was in police custody. Nobody at Geico viewed the car until approximately March 21, 2006. Whitaker was comfortable with the insurance company's decision to declare the vehicle a total loss. The Respondent still has an active insurance policy with Geico.

Whitaker did not know if anybody checked the scene for skid marks. He explained that the only way that the car could have been towed without leaving skid marks would have been for the perpetrator to jack the car up and use dollies, which is a noisy and time-consuming process.

Whitaker testified that it was not impossible that the person who stole the Respondent's car the first time, using the key that he had taken, stole the car a second time in February 2006 and took it to the dumping location. At that point, somebody else might have unsuccessfully attempted to steal the vehicle. The damage to the door and steering column could have been caused by a vandal or an amateur larcenist attempting to take the car.

On redirect examination, Whitaker testified that as a result of the address change from Queens to Long Island, the Respondent's insurance rate was reduced by approximately $1,600 annually. According to Whitaker, fraud is not grounds for an insurance company to drop a policyholder in New York State. Whitaker called it "a big stretch of the imagination" to believe that the perpetrator who stole the Respondent's car the first time waited a year to steal it again and dumped it at the recovery location, where it was subsequently vandalized by somebody else.

On recross-examination, Whitaker testified that he has handled over a thousand stolen car claims since he began working at Geico. Between 65 and 75 percent of those vehicles have ultimately been recovered. Whitaker testified that it is not always easy to apply logic to the theft and recovery in the cases he works on. Fairly often, cars are taken and recovered, and Whitaker cannot put his finger on exactly what happened. A number of theft cases turn out to be joyriding cases, which means that the person who took the car did not intend to keep the car permanently.

On continued redirect examination, Whitaker testified that the damage done to the Respondent's car was not consistent with joyriding. He explained that the damage was all cosmetic in nature. In his opinion, the damage was done to foster an idea that the vehicle was stolen when, in fact, it was not.

On continued recross-examination, Whitaker testified that without Hennings' forensic evaluation report, he never would have recommended that the Respondent's insurance claim be

denied. He stated on further redirect examination, however, that even without Hennings' report he would have forwarded the Respondent's case onto the insurance company's Special Investigation Unit because of the fire damage. He explained on further recross-examination that all theft cases involving fire are automatically forwarded to the Special Investigation Unit.

Police Officer Robert Rizzotto

Rizzotto, an 11-and-a-half-year member of the Department currently assigned to the 105 Precinct, was deemed an expert in auto theft. Also currently, and for the past four-and-a-half to five years, he was his command's Grand Larceny Auto Coordinator, which means he was responsible for reviewing all car theft cases. He also evaluated recovered vehicles for indications of how the vehicle was stolen, damage to the vehicle, missing components, indications of an accident, and signs of fraud. Rizzotto was previously assigned to the Queens South Auto Larceny Unit and the 107 Precinct Grand Larceny Auto Unit. During the course of his career, he had effected between 50 and 60 auto theft arrests. Of those arrests, between six and eight involved arson, and between 15 and 20 involved insurance fraud or false reporting. Rizzotto testified that his hobbies include repairing and restoring vehicles, a hobby he first started when he was approximately fifteen years old. He received through the Nassau County Fire Department training on the subject of arson, and he was a certified New York State interior structural firefighter. In addition, he was a member of the New York Anti-Car Theft and Fraud Association.

On voir dire examination, Rizzotto testified that he has neither been deemed an expert nor testified in an expert capacity before. The only trials at which he has testified were for cases in which he had an active role in collecting evidence. Although he examines cars as part of his

job, he is not qualified to do ignition tests or any other certified test. Rizzotto examined the Respondent's vehicle for approximately 40 minutes while it was being held at the Carriage House. He did not conduct any tests on the car, but he observed that the steering wheel was locked. Rizzotto was the first person to get into the car. He explained that the car's rear door window was unlocked, and he had a Carriage House employee reach inside the vehicle to unlock the door. He saw the vehicle again after it was moved from the Carriage House to the 105 Precinct station house.

On continued direct examination, Rizzotto testified that he was assigned to investigate the theft of the Respondent's car. Rizzotto described the car as a type that is not commonly reported stolen. When he examined the car at the Carriage House, he observed that there was no major body damage, no components were missing, no wires were cut, and there was no apparent sign of forced entry. There was, according to Rizzotto, a little damage to the driver's door lock, but all of the damage to the vehicle appeared cosmetic. He reiterated that the rear door window was unlocked, but there were no tool marks to indicate that the window had been jimmied or forced in any way. None of the windows in the car was open and none of the doors was unlocked. Rizzotto testified that, based on his experience, it turns out that a recovered car with locked doors was usually last parked by the car's owner. He explained that this is especially true in cases where the car has suffered fire damage but there is no sign that the car was stolen for parts. Rizzotto further explained that it is common for an owner who wants to dispose of his vehicle to lock the car doors because he subconsciously does not want other people to go through it.

Rizzotto testified that he observed during his examination that the Respondent's inspection sticker had expired approximately five months earlier. He stated that, based on his

experience, a vehicle owner who goes that long without renewing the inspection sticker either does not plan on keeping the car for much longer or feels unable to pass inspection due to mechanical problems too expensive to repair. The inspection sticker on the Respondent's vehicle indicated that the car had 118,784 miles on it. Rizzotto explained that the mileage on the sticker represented how many miles the car had on it at the time of its last inspection, which would have taken place on October 12, 2004. Rizzotto did not know how many miles the car actually had on it at the time that it was reported stolen.

Rizzotto testified that because the ignition cylinder in the Respondent's car was equipped with the Passlock 1 anti-theft system, the vehicle would have started only with a key that had the right resistance level built into it. A copy of the car key, therefore, would not have been able to turn the car on unless the copy's resistance had been set at the exact resistance level required by the ignition switch. Rizzotto stated that usually a newly copied key is not buffed completely and would leave residue. In his visual inspection of the vehicle, Rizzotto did not observe any residue of this sort. The Passlock 1 system, according to Rizzotto, would have made it impossible for somebody to start the car by forcing a tool into the ignition cylinder or by hotwiring.

Rizzotto testified that he noticed a strong odor of a petroleum-based product, such as accelerant, inside the car. Rizzotto subsequently vouchered a one-gallon plastic Poland Spring bottle and miscellaneous papers that were found in the car (see DX-20, voucher). He also requested that a flammable liquid examination be conducted on the Poland Spring bottle and on a swabbing that was taken of the inside of one of the car windows (see DX-21, Lab Examination Request Form). The resulting Laboratory Analysis Report (DX-22) indicated that gasoline was detected inside the Poland Spring bottle. No other residue was detected anywhere else.

Rizzotto testified that during the course of his investigation, he had the opportunity to review the findings in Hennings's forensic evaluation report. He explained that when Hennings wrote that there was no evidence of "a successful forced rotation, extraction or punch attack," it meant that the door locks were intact, that nothing had been stuck in the locks to force the doors open. Rizzotto defined "forced rotation" as inserting a tool into the lock to grab the interior of the lock and spinning the lock in its entirety. This procedure, according to Rizzotto, would result in the lock being hollowed out and the door loosened. He defined "extraction" as putting a screw into the lock, pulling the lock out, and then reaching in with a screwdriver to turn the linkage. He defined "punch attack" as opening the door by punching a hole in the sheet metal or prying the door handle. Rizzotto stated that he did not see any evidence of any of these procedures having been conducted on the Respondent's car.

Rizzotto testified that he did not observe in his visual inspection of the car any scrape or tool marks around the door frames. He stated that while the majority of the time there remains some indication of force whenever a car door is pried open, he did not observe any evidence of forced entry upon inspecting the doors of the Respondent's vehicle. Based on his observations and review of Hennings's report, Rizzotto concluded that the perpetrator gained entry into the Respondent's car with a key.

Hennings wrote in his report that the column-mounted gear selector was in the parked position and locked. Rizzotto explained that this is the position that the selector must be in for a key to be removed from the ignition. Hennings wrote that the transmission linkage was intact, and Rizzotto explained that a vehicle's transmission can manually be shifted to neutral by going under the vehicle and removing the pin from the transmission linkage. According to Hennings, the fact that the gear selector in the Respondent's car was in a parked and locked position and the

transmission linkage was intact meant that the vehicle was parked at the recovery location and was not tampered with afterwards.

Rizzotto explained that when Hennings wrote in the steering column section of his report that the keyway exhibited no indications of distortion, it meant that there was no indication that a foreign object was pried into the key hole in an attempt to start the car. Hennings also wrote that the plug was in the locked position and secured. Rizzotto explained that the plug is basically the same as the ignition, and it cannot be rotated without having the key in it. Hennings further wrote that the steering column was locked. This meant, according to Rizzotto, that the steering wheel was also locked. Rizzotto explained that if someone had forced the steering wheel, there would have been damage to the steering column and it would have been impossible to relock the wheel. Rizzotto testified that as far as he knew the only way that the Respondent's steering wheel could have been unlocked was with a key, and in his opinion the vehicle was driven to the recovery location.

On cross-examination, Rizzotto testified that no indicia of theft were left on the Respondent's vehicle when, at the Carriage House, he pushed open the car's rear door window and a Carriage House employee reached inside to unlock the door. He conceded that, thus, the perpetrator could have also gained entry through the back window had that window been left open on the day of the theft, Rizzotto did not know if the car doors were locked at the time of the theft, although all of the doors were locked when he arrived at the Carriage House. He believed that the car's remote control lock would have automatically locked the back window when it locked the car doors, but he did not have the remote control lock to test this assumption. Rizzotto was not aware of anybody at the Carriage House going inside the car before he did.

Rizzotto stated that while a newly copied key can leave shavings behind, these shavings can be wiped off with a rag. The Respondent's car had only one key for both the doors and the ignition. Rizzotto testified that a copy of the key not set at the right resistance level could still have been used to get inside the car and turn the ignition cylinder. The copy could not have been used, though, to start the car. Rizzotto stated that to replace a lost key, an owner of a car with the Passlock 1 system must go to a dealership or a trained locksmith to program a new key. According to Rizzotto, it is possible that one key could start more than one individual Chevy Blazer.

Rizzotto agreed that some amount of damage is ordinary for a car with over 120,000 miles on it. He further agreed that because people often gain entry to their cars by using their remote controls, it is possible that a driver might not notice that he has damage to his lock. Similarly, it is possible that a driver might not even notice damage that was caused during a theft attempt.

Rizzotto testified that he did not notice anything about the Respondent's car that would preclude the car from passing inspection. He stated that a police officer with a Department parking placard displayed should not have to worry about getting a summons for an expired inspection sticker. He was not aware of Geico ever turning the car on to see if it still ran. Rizzotto stated that a tread reading taken by Hennings indicated that the tires on the Respondent's car were in the middle of their life. Rizzotto conceded, however, that he could not say for certain that the tires were not new.

Rizzotto testified that all car theft cases in which a car has been set on fire result in investigation. In these cases, Rizzotto interviews people to see if the car owner has enemies or has recently been threatened. He also looks to see if the owner has recently been involved in a

domestic dispute or court ruling. Rizzotto did not take any of these investigatory steps in the Respondent's case. Rizzotto stated that if the Respondent had not been a member of the service, Rizzotto would have interviewed the Respondent, checked his telephone records, and investigated his friends.

Rizzotto testified that the more mileage a car has on it, the less insurance money the car owner will collect. According to Rizzotto, people who steal and dump their own cars want to collect the full insurance amount and do not want their crimes to be traced back to them. They, therefore, do not want their cars to ever be recovered. Cars have been dumped in rivers and burned down to the ground.

Rizzotto reiterated that his examination of the Respondent's car lasted approximately 40 minutes. During the examination, he did not sit in the car, but he stuck his head and leaned his torso in. He conducted a visual examination, checked the steering wheel and ignition, and took photographs. He also looked for indications and burn patterns. He explained that the Poland Spring bottle had a texture that would have made it difficult to lift prints. The vehicle was taken from the Carriage House to the 105 Precinct station house. Although Rizzotto saw the car while it was parked in back of the command, he never examined it again.

On redirect-examination, Rizzotto testified that while a single key could start more than one Chevy Blazer, if somebody were to go through the hassle of searching the world for a vehicle with a matching key, that person would strip the car or change the vehicle identification number in order to get some kind of benefit for his trouble. No parts were taken from the Respondent's car. Rizzotto stated that it was unlikely that somebody stealing a car for revenge or taking a car for a joyride would lock the doors and climb out the back window after dumping and torching the car.

Rizzotto testified that twelve days passed between the date the Respondent reported his car stolen and the date the car was recovered by Falcone. Rizzotto stated that it is unknown how many of those days the car was parked at the recovery location. Similarly, it is unknown what kind of damage, if any, was done to the car while it was parked there. Rizzotto agreed that it was possible that somebody took the Respondent's car for a joyride and dumped it at the recovery location without doing any damage to it. Then, after seeing the car parked there for a while, somebody else could have attempted to break into the car and damaged it. In other words, the person who drove the car to the recovery location was not necessarily the same person who set fire to the car.

Upon questioning by the Court, Rizzotto testified that, based on his personal observation, it did not appear that the Respondent's car had been opened with a slim jim. Slim jims leave behind marks on the metal. Rizzotto testified that as far as he knows, there is no master list of the resistance levels required by vehicles equipped with the Passlock 1 system. He knew of no handheld resistance-producing mechanical device that car thieves can use to start cars with this system.

On continued recross-examination, Rizzotto testified that there are cars that get stolen and are never recovered, and he has no idea how these cars were taken.

The Respondent's Case

The Respondent called Natacha Menzies as a witness and testified in his own behalf.

Natacha Menzies

Natacha has been employed for eight years as a diplomatic security officer. She was employed by a private firm that contracts with the State Department. She has lived on 230th

Street in Cambria Heights since she was four years old, and she still lives at that location with her parents, brother, and sister. She and the Respondent have two children together, Joshua and Victoria. When Joshua was born in 2001, Natacha and the Respondent were not living together. The Respondent lived at that time in Richmond Hill with three children from his first wife.

When Victoria was born in 2003, she was premature and sick. Victoria had to stay in the hospital until she was two years old with eight or nine months of that period spent in intensive care. When Victoria was released from the hospital, Natacha brought her home to the Cambria Heights residence, where she was fed by a feeding tube and received nursing care for an additional year. The Respondent and Natacha got married in February 2004. At that point, the Respondent began to split his time between the Cambria Heights house and the Richmond Hill house.

Natacha testified that she planned to find a house where she and the Respondent could live together with their children, and in November 2004 they found a fixer-upper in North Babylon. Natacha explained that her parents helped her and the Respondent to pay for the house, and her parents' names are on the deed. They closed on the house in February 2005. Natacha planned for her brother, who is a contractor, to do work on the house before they moved in. The Respondent also did work on the house while he was off duty. Natacha and the Respondent had not moved yet to their new home.

Natacha testified that she has had Geico car insurance since before she was married. After she and the Respondent married, she added the Respondent onto her insurance policy. At the time, she and the Respondent owned two vehicles. She informed Geico at the time that she lived in Cambria Heights, and she used the Cambria Heights residence as her mailing address.

Meanwhile, in preparation for the move to North Babylon, she worked toward having her son enrolled in the North Babylon school system. She explained that the school system required proof of residency, so she arranged to have her address changed to North Babylon at her bank and insurance company. Natacha testified that while she was on the telephone with a Geico representative about an unrelated matter, she informed the representative that she had bought a house in North Babylon into which she eventually planned on moving. According to Natacha, the Geico representative replied, "Well, do you know that you can get a better rate if it's Suffolk [County]? Since you're moving in, we will switch it right now." Natasha stated that the Geico representative switched the rate address to North Babylon without asking for any documentation. Natacha testified that she did not tell the Geico representative that she was moving right then, and the Geico representative did not say anything about having to wait until the actual move before changing the insurance rate. After changing addresses, Natacha noticed the rate reduction.

Natacha testified that it is she, not the Respondent, who always handles the insurance paperwork and telephone calls to the insurance company. After changing addresses, Natacha gave the Respondent an updated insurance card without having any discussion with him about it. In March 2006, Natacha received from Geico a letter (RX-A, letter dated Mar. 8, 2006) indicating that her insurance policy was erroneously rated for the North Babylon address and should have been rated instead for the Cambria Heights address. When Natacha called Geico, a representative informed her that her rating address should have never been changed without documentation. Geico changed Natacha's rate address back to Cambria Heights. The insurance company did not reprimand or penalize Natacha in any way, nor did it threaten to cancel her

policy. Natacha still pays the Cambria Heights rate, but Geico still uses the North Babylon residence as the mailing address for Natacha's policy.

RX-B is a copy of a letter from Geico addressed to the Department, dated October 17, 2007. It indicates that the rate address was changed from Cambria Heights to North Babylon effective April 23, 2005, and changed back to Cambria Heights effective March 1, 2006.

Natacha testified that the Respondent had nothing to do with the telephone calls that were placed to Geico about changing addresses. When the Respondent's car was stolen, the insurance company initially contacted Natacha about it. Natacha instructed the insurance company representatives to call her husband instead. According to Natacha, she and the Respondent were not experiencing any financial trouble at the time of the theft, and the family relied on the Respondent's Chevy Blazer. The Respondent never gave Natacha any indication that he was thinking about committing insurance fraud and Natacha stated that she would not have tolerated that kind of conduct. Natacha testified that the Respondent spends the majority of his nights at the Richmond Hill address but stays at the Cambria Heights address three or four nights a week.

On cross-examination, Natacha testified that while the Respondent owned the Chevy Blazer, he also had a company car, a Plymouth.[5] She owned an Acura at the time. Natacha and the Respondent used the Chevy Blazer to transport their children. Because they only had one set of children's car seats, though, the seats needed to be removed from the Chevy Blazer if the children were going to ride in one of the other vehicles. The car seats were not in the Chevy Blazer when that car was stolen. Natacha stated that she did not know if the Respondent started to use the company car prior to the theft.

Natacha testified that her family was renovating the house in North Babylon at their own pace. She agreed that the renovations could have taken a month or two years. The renovations

[5] The Respondent later testified (see p. 42, infra) that he worked for a security company owned by his cousin.

slowed down when Victoria was released from the hospital and could not be moved from the Cambria Heights house.

Natacha testified that she did not pay the insurance policy on a monthly basis. She reiterated that when she had the rate address moved to North Babylon, the Geico representative never asked her to submit proof of the new address. According to Natacha, she specifically told the Geico representative, "I have a home in Babylon, but I do not live there . . . . I do not live there now, but I intend to live there." Natacha testified that although the letter from Geico to the Department concerning the dates of the rate change (RX-B) indicated that she received the North Babylon rate starting in April 2005, in actuality she did not receive the reduced North Babylon rate until October 2005. She explained that her policy term ran from October until April and, since Geico caught the mistaken rate in March 2006, the reduced North Babylon rate was in effect for a period of only five months. Natacha admitted that she was not certain, however, exactly when the rate reduction took effect.

Natacha stated that if she had not received the March 2006 letter from Geico (RX-A), she would never have known that she was receiving the North Babylon rate in error. Her telephone call to Geico about the mistake took place after she received RX-A and after the Respondent's car was reported stolen. Natacha has owned the North Babylon house for three years, but due to circumstances her family has not yet moved there. She, nevertheless, pays the mortgage, utilities and landscaping at that house. In addition, she goes to the house to pick up mail that is delivered there.

Natacha testified that for her job she is required to maintain a level of security clearance, and she carries a firearm while on duty. She is not aware of any repercussions that she would experience at work in the event that the Respondent is found guilty of insurance fraud in this

proceeding. She stated that she is "on" the Respondent's employment benefits, and the Respondent's income is important to her family's finances. Natacha was not with the Respondent when he parked his car the night that it was stolen or the next day when the Respondent discovered it was stolen.

On redirect examination, Natacha explained that she did not receive notification of the mistaken insurance rate until March 2006. She stated that her family has not yet moved to North Babylon due to circumstances keeping her in Cambria Heights. She explained that they could not move at first because her daughter came home from the hospital and could not be moved, then her son started school, and then her schedule changed at work and nobody would have been available to watch the children if they moved out of Queens.

Upon questioning by the Court, Natacha testified that she decided to enroll her son in the North Babylon school system for the 2005-2006 school year. That year, she received a postcard (Court Exhibit 1) from a preschool in Bay Shore (a town near North Babylon) about registering her son. The postcard, which was postmarked July 15, 2005, indicated that payment must be made by August 1, 2005, in order to begin class on September 7, 2005.

On recross-examination, Natacha testified that she handles the registration and inspection for her car, and the Respondent handles the inspection and registration for his. Her car is registered and inspected in Cambria Heights. She did not know if it was necessary to have her registration and inspection changed to North Babylon. The Cambria Heights address is on her driver's license.

Respondent Police Officer Andre Menzies

The Respondent, a six-year member of the Department, testified that he was married out of high school and had three children with his first wife. In 1998, his first wife died, and he moved with his children into the Richmond Hill house where his parents and siblings lived. The Respondent met Natacha in 2000. They had two children together and got married. Natacha and the two children lived at the Cambria Heights address. The youngest child, Victoria, was born with a lot of complications.

The Respondent stated that he split his time between the two residences, spending four nights a week in Richmond Hill and three nights a week in Cambria Heights. The Respondent wanted to move with Natacha to a house where all of his children could live together, and Natacha's parents helped the Respondent to purchase the house in North Babylon. The Respondent stated that he planned to renovate the North Babylon house and move in as soon as Victoria was well enough. The Respondent's brother-in-law did renovations on the house, and the Respondent would go to the house to assist in the renovations whenever he had spare time.

The Respondent testified that when he bought the Chevy Blazer, it was a used car in great condition. He had his own car insurance policy with Geico, but he was added to Natacha's policy after they got married. The Respondent stated that Natacha handled the communications with Geico. When new insurance cards arrived, Natasha would give the Respondent his card, and he would place the card in his glove compartment.

The Respondent testified that on March 12, 2003, his car was stolen from in front of his Queens command. He explained that the car was taken when he ran inside the command to drop off a piece of paper and left the car running. The car was recovered three hours later in Brooklyn. The car key, the Respondent's wallet, and documents with the Richmond Hill address

were taken from the car. The perpetrator was never apprehended. Because the Respondent did not have an extra car key, the Respondent needed to have the car towed to a Chevrolet dealer in order to have another key issued. The car was towed on a flatbed truck. The car dealer did not tell the Respondent anything about the key having a computer chip or special sensor. RX-C is a copy of the Complaint Report for the March 12, 2003, theft.

The Respondent testified that at some point he was involved in a traffic accident, and his car's rear differential was totally destroyed. The car was in the shop for two months, and Geico paid for the repairs. The Respondent claimed that unless somebody pointed it out to him, he probably did not notice that his inspection sticker was expired.

The Respondent testified that between 10:00 p.m. and 11:00 p.m. on February 26, 2006, he parked the Chevy Blazer six or seven houses down from the Richmond Hill residence. When he went outside the next morning, the car was gone. The Respondent called 911, on-duty personnel responded to the scene, and a Complaint Report was prepared. The Respondent subsequently notified Geico of the theft, and Geico sent him a Vehicle Theft Questionnaire. According to the Respondent, he filled out the top part of the questionnaire, and Natacha filled out the middle part. On the questionnaire, the Respondent gave the North Babylon address as his residence address. The Respondent testified that the North Babylon address was the address listed on his insurance card, and Whitaker instructed him to use the address on the questionnaire. The Respondent stated that he made a mistake when he indicated on the questionnaire that his car had never before been stolen. He explained that maybe he did not think to indicate that the car had previously been stolen because the 2003 theft did not result in an insurance claim. The Respondent testified that he used the Cambria Heights address in the notary section of the

questionnaire because the Cambria Heights house was one of his residences, he spent three nights a week there, and Natacha lived there.

In the Respondent's telephone interview with Whitaker, the Respondent told Whitaker that he did not have an extra key for the car. He went on to tell Whitaker, though, that the car had been stolen once before. The Respondent explained that he told Whitaker about the previous theft because he realized it was significant that an extra key was "floating around."

The Respondent testified that at the time he was engaged in off-duty employment with a security company. The company was run by his cousin and had a car registered to it. After the Chevy Blazer was stolen, the Respondent used the company car to get around. He also used Natacha's car.

The Respondent testified that he learned the Blazer had been recovered when Whitaker called him and informed him that the car was at the 105 Precinct station house. Whitaker told the Respondent that Geico was going to pay to have the car repaired, that the Respondent should go look at the car, and that he should have the car released to the insurance company. The Respondent testified that when he went to the 105 Precinct and told the Desk Officer that he was there to have his car released to Geico, the Desk Officer informed that the car was parked in the back of the command. The Respondent went to look at the car, but it was locked.

Approximately a week later, the Respondent returned to the 105 Precinct. The Respondent testified that the Desk Officer sent him out back to see the car, and the Geico adjuster happened to be there at the time. Nobody told the Respondent that it would be improper for him to go near the vehicle, and the Respondent did not know at the time that he was the subject of an investigation. The Respondent testified that he stuck his head in and looked into

the car, but he did not sit down or touch anything inside the vehicle. He explained that he would not sit in a fire-damaged vehicle.

Because of the damage he observed, the Respondent called Whitaker and informed him that the car was not drivable. Whitaker later called the Respondent back to inform him that Geico changed its mind about repairing the car and was going to declare the vehicle a total loss instead. The Respondent ultimately received from Geico $4,994 for the Chevy Blazer plus approximately $700 in reimbursement for money he had spent on rental cars. He spent approximately $3,000 of that amount to purchase a used Honda. He spent the remainder of the insurance money on getting a new transmission and other upgrades to the Honda. Unlike the Blazer, the Honda is not large enough to fit the Respondent's whole family. The Respondent testified that he has not benefited financially in any way from getting rid of the Blazer, and he would rather have the Blazer instead of the Honda. At no point did Geico dispute the Respondent's insurance claim or make the Respondent give a statement under oath. The Respondent is still a Geico customer.

The Respondent testified that his Department parking placard was not in the Chevy Blazer when the vehicle was stolen in February 2006. He explained that he always took the placard with him when he parked for the night because he was informed the first time the car was stolen that he could be penalized for failure to safeguard Department property whenever Department property left inside a vehicle is taken or goes missing. Although the placard had the Chevy Blazer's license plate number written on it, the Respondent used the placard in other vehicles. He explained that he used the placard to park at work and, on days that he drove a car other than the Chevy Blazer to work, he would let the Desk Officer or Integrity Control Officer

(ICO) know which car the placard was in. Nobody ever reprimanded the Respondent for this conduct or told the Respondent that he was in violation of procedure.

The Respondent testified that before the car was stolen in February 2006, he had approximately $1,400 worth of body work done to the vehicle. In late 2005 or early 2006, he bought brand new tires for the car. He stated that each tire cost $200 or $250.

The Respondent testified that although he never prepared paperwork to make the Department aware of the Cambria Heights address, he let his Commanding Officer know that he had a sick child in Cambria Heights and was going back and forth between Cambria Heights and Richmond Hill. He explained that he never officially changed his residence, he still has three children living in Richmond Hill, and he still resides there himself.

The Respondent testified that he was on sick leave in March 2006. He explained that he had been hospitalized for heart problems, and "they had some questions about my head" as well. He stated that he was at the Richmond Hill address when he initially went sick, but he subsequently called into the Sick Desk to change his sick address to Cambria Heights. He explained that he went to the Cambria Heights address to be with his sick daughter.

The Respondent testified that on the morning of March 22, 2006, he called the Sick Desk to let the Department know that he was leaving his sick residence to go to a scheduled CAT scan in Garden City. The Respondent left his Cambria Heights house earlier than necessary because he originally thought the appointment was at noon. When he realized that it was not until 1:00 p.m., he ended up returning home and waiting until 11:00 a.m. to leave again for the doctor's office. He did not call the Sick Desk before leaving home this second time. According to the Respondent, he had at the time a pass to be out of residence.

The Respondent testified that when he was notified to appear for the December 5, 2006, Official Department Interview, he did not know what the interview was going to be about. On the day of the interview, the Respondent was informed by his attorney that he was being investigated "for a vehicle."

Before the interview, the interrogators did not mention anything about fraud or arson. According to the Respondent, he was startled when the interview began and he realized that he was the subject of an investigation into the Chevy Blazer. The investigators told him that he was under investigation for some kind of fraud concerning the vehicle.

The Respondent testified that Valerga and Micozzi fired questions at him, screamed at him, and demanded answers. He testified that he has since had a chance to listen to the interview tape, and he heard mistakes that he had made during the interview. The Respondent stated that both he and his daughter were very sick that day, and all he could think about was getting home to his child. Toward the end of the interview, the Respondent was asked if he had committed insurance fraud. After an eight-second pause, the Respondent answered this question affirmatively. The Respondent explained that his affirmative response was a mistake, and he answered in that manner because he was tired, sick, and under a lot of duress at the time. He further explained that at that point in the interview, he had zoned out. According to the Respondent, at no other point during the interview did he admit to having anything to do with the theft of his vehicle, and he never intended to admit to misconduct.

The Respondent reiterated at trial that he did not file a false insurance claim, and he had nothing to do with the theft of or damage to his vehicle.

The Respondent testified that he did not know if his Chevy Blazer key was equipped with any sort of anti-theft technology. According to the Respondent, he went to a Chevrolet

dealership on November 12, 2007, to find out if the car's ignition would have required a key with a computer chip. He stated that after giving the vehicle identification number (VIN) for the Chevy Blazer, three different dealers informed him that there was no computer chip in the key. The dealers also informed him that any locksmith can cut a key for a Chevy Blazer. The Respondent neither knew any of the dealers nor paid them anything for their services. The Respondent testified that he did not specifically ask the dealers if the car was equipped with the Passlock 1 device or if the key had a resistor on it.

RX D is a statement prepared on invoice paper at Nemet Motors on November 12, 2007. It states that the Respondent's vehicle did not operate off of an immobilizer within the key or with a chip within the key.

On cross-examination, the Respondent testified that he completed the Vehicle Theft Questionnaire on March 20, 2006. He reiterated that on the questionnaire he gave the North Babylon address as his current residence, and he gave the Cambria Heights address in the notary section. He also reiterated that because he never put in an insurance claim for the 2003 theft, he did not indicate on the questionnaire that his car had previously been stolen. The Respondent did indicate on the questionnaire that only he had custody of the vehicle at the time of the theft, that there was only one set of keys for the car, nobody had an extra car key, there were no missing keys, the car was locked, and the car alarm was in use. The Respondent left blank a section entitled, "Briefly describe any vehicle usage 24 hours prior to theft." The Respondent claimed that he forgot to fill this section in.

The Respondent told Whitaker in the April 5, 2006, telephone interview that he had been living at the Cambria Heights address for approximately two years. The Respondent was not certain during the interview what the Cambria Heights zip code was. He indicated in the

interview that the car doors were locked, the car had an alarm in it, there was no glass or debris on the ground when he discovered the car missing, and the car was parked five or six houses down the block from the Richmond Hill address.

The Respondent testified that the houses on the block are in relatively close proximity to each other, but he was not certain of the exact distance. While some of the houses have driveways, others are attached and do not have driveways. The distance from the Richmond Hill residence to the parking spot was just a few paces. Although the Respondent has lived at the Richmond Hill residence for approximately 22 years, he does not know all of the addresses on the block. The Respondent could not recall during his Official Department Interview the exact address in front of which the car was parked.

The Respondent told Whitaker that the person who stole his car in 2003 took the car keys and papers with his address on it, but he did not tell Whitaker anything about the perpetrator taking his wallet. Similarly, the Respondent did not mention during his Official Department Interview that his wallet was taken during the 2003 theft. The Respondent explained that he was not specifically asked by the interrogators what was taken during that theft.[6]

The Respondent stated in his Official Department Interview that Geico made a mistake when it listed the North Babylon address as the rate location. The Respondent testified that he lived in Richmond Hill and Cambria Heights, and the North Babylon address was supposed to be used by Geico as just a mailing address. The Respondent explained that he and Natacha wanted to use the North Babylon residence as a mailing address so that they could establish residency and get their children into the school system out there. The Respondent's Chevy Blazer was

[6] In his Official Department Interview, the Respondent offered that the recovered vehicle "had no keys to it, there was a lot of my papers and stuff was missing with my address . . . there [was] a lot of stuff missing out of [the vehicle]."

never garaged in North Babylon. The Respondent stated in his Official Department Interview that he knew a vehicle must be titled, registered, and insured for the same address.

The Respondent testified that he recalled that when he was first hired by the Department he agreed that he would notify his Commanding Officer of any change of residence. The Respondent reiterated that he never actually moved out of the Richmond Hill residence, and so he never prepared a Change of Name, Residence or Social Condition form for the Cambria Heights address. The Respondent also reiterated that he told his Commanding Officer that he had a sick child in Cambria Heights and was staying there. According to the Respondent, he documented the Cambria Heights address on his ten-card.

The Respondent testified that on March 22, 2006, he called the Sick Desk at 7:30 a.m. to get permission to leave the house for his doctor's appointment. He did not call the Sick Desk back when he realized that the doctor's appointment was not until later in the day. He contended that his cell phone battery was dead at the time. At some point later in the day, his mother called him to let him know that someone was looking for him. By this time his cell phone was working again, and he called the Sick Desk. The Respondent testified that he "never, ever" uses the landline in the Cambria Heights house. He "just [did]n't use their phone."

The Respondent testified that when Valerga asked in the Official Department Interview if he had "committed insurance fraud" or falsely reported the Blazer as stolen, Valerga instructed him to think about the question before answering. According to the Respondent, although he paused before giving an answer, there was a lot going on and he did not actually think about his answer.

The Respondent testified that he had been in two or three accidents with the Chevy Blazer. The Respondent put new tires on the vehicle at some point after October 2005. He

stated that nobody at the auto shop informed him that the inspection sticker on the car was expired.

The Respondent testified that when he was out in the field, he received threats stating, "We know who you are. We know where you live." He mentioned these threats to his sergeant.

It was stipulated that in 2003 the Respondent documented with the Department that a gang member threatened that he had paid $5,000 to have the Respondent killed.

On redirect examination, the Respondent testified that since the February 2006 theft, he caught somebody breaking into his Honda. The Respondent apprehended the perpetrator and waited for on-duty personnel to take the perpetrator into custody. According to the Respondent, the perpetrator told him that somebody in Brooklyn instructed the perpetrator that the Respondent's car was the car that "had to [be] hit."

RX-E is a copy of the Criminal Court Complaint relating to this incident. It states that on June 29, 2007, Miguel Morales was arrested for breaking into the Respondent's Honda and stealing the radio. The car was found with the driver's side window broken off of its track and the dashboard broken. The Complaint listed that place of occurrence (i.e., where the car was situated at the beginning of the incident) as 101-56 124th Street in Queens.

The Respondent testified that in October 2007, his car was broken into again. In this incident, according to the Respondent, a panel from the driver's side door was removed, the radio was stolen, and a PBA book and other materials were also taken from inside the vehicle. The Respondent filed a Complaint Report, but a perpetrator was not found.

FINDINGS AND ANALYSIS

Specification Nos. 1 & 2

The first two specifications charge the Respondent with falsely reporting his vehicle as stolen and filing a fraudulent insurance claim to that effect. Both specifications rely on the same underlying allegation: that the Respondent, acting alone or in concert with others, made it appear that his 1998 Chevy Blazer had been stolen and damaged, when, in fact, he stole or damaged it himself then took the money paid out by his insurance company, Geico.

These specifications rely almost entirely on circumstantial evidence. The one exception is an alleged admission by the Respondent during his Official Department Interview that he falsely reported his vehicle as stolen (see pp. 53-54, infra). The rules concerning circumstantial evidence are the same for criminal cases as for civil cases. See People v. Wachowicz, 22 N.Y.2d 369, 372 (1968); Caporino v. Travelers Ins. Co., 95 A.D.2d 160, 164 (1st Dept. 1983), rev'd on other grounds, 62 N.Y.2d 234 (1984). The facts from which guilt is drawn must be inconsistent with innocence and exclude to a moral certainty every other reasonable hypothesis. See People v. Giuliano, 65 N.Y.2d 766, 767-68 (1985).

Here, the Department relies on various facts that ultimately do not exclude every reasonable hypothesis of the Respondent's innocence. See *Disciplinary Case No. 63673/89* (because the circumstantial evidence was inconclusive, member found Not Guilty on charge of falsely reporting vehicle stolen and attempting to collect insurance). The Department introduced a forensic examination conducted by Glenn Hennings, a private investigator hired at the direction of Geico's investigator, Whitaker. The Hennings examination (see DX-10, Hennings report) found that while there were tool marks near the left door lock, and the "dust shutter" and "face cap" were missing, there was no evidence of a forced or covert entry into the left door, so this

aforementioned damage was "cosmetic." Additionally, the ignition column's cover was removed, but the lock itself was not tampered with and there was no sign of hotwiring. Furthermore, Police Officer Rizzotto explained that the resistance technology of the Passlock 1 antitheft system (noted to be present by Hennings) meant that the factory-issued key was programmed with the correct amount of resistance needed to start that vehicle's ignition.

The inference sought by the Department from the Hennings report was that a key was used to start the Blazer, but that someone tampered with the door lock and ignition in a superficial way to make it seem like a thief had broken into and hotwired the vehicle.

The main problem with this assertion, however, is that Hennings did not testify and could not be examined by the Respondent or the Court about the very central conclusions he made in his report. The lead Department Advocate on this matter stated that Hennings was "very uncooperative." While Hennings did eventually come to the Department Advocate's Office to prepare the case, he was "very unprepared . . . rather disrespectful" and "downright nasty." The Department decided that they would not call Hennings as a witness.

The Court decided that it wanted Hennings to be called as a witness and issued a subpoena to that effect. The Department subsequently advised that Hennings called the Department and said that he would not be coming to testify.

It is well-settled that hearsay is admissible in this forum. Matter of Gray v. Adduci, 73 N.Y.2d 741, 742 (1988); Matter of Bulger v. Safir, 300 A.D.2d 656, 657 (2d Dept. 2002). In order to constitute substantial evidence, however, the hearsay must be sufficiently relevant and probative. See People ex rel. Vega v. Smith, 66 N.Y.2d 130, 139 (1985); Matter of Shuman v. New York State Racing & Wagering Bd., 40 A.D.3d 385, 388 (1st Dept. 2007).

In the instant case, it was not possible for the Court to fully determine the credibility of the Hennings findings without his presence at trial. The Court wanted to know whether the Passlock 1 system could be defeated by a determined thief, either technologically or manually.

Moreover, the Respondent introduced a report (RX-D) from Nemet Motors, a business that serviced Chevrolets and other makes. Nemet generated a document about the Blazer, apparently by using the car's VIN. Nemet stated that the vehicle "doesn[']t operate off of a immoblier [*sic*] with in key." Additionally, the Blazer did not "operate with a clip with in key." Rizzotto, on the other hand, indicated that the Passlock immobilizer was located in the ignition column itself, and that the correct key had a resistance which would match that in the immobilizer. Still, the Nemet report raised questions about whether Hennings and Rizzotto were correct about the antitheft characteristics of the Passlock system.

Because this Court is unable to conclude that only the Respondent's key could have started the Blazer, the remaining suspicious circumstances, like the arson, the locked door, the superficial damage to the door and ignition, and the overdue inspection, are not substantial enough for the Court to conclude to a moral certainty that the Respondent was behind the incident. A remaining reasonable hypothesis is that a thief stole the vehicle with a key, then abandoned his efforts, perhaps upon seeing the Department and PBA papers in the car. That thief could have started the fire to destroy any evidence he might have left. It must be noted that about twelve days passed between the time the Respondent asserted his car was stolen and the day it was recovered by Police Officer Falcone. It is possible that a second thief could have caused the superficial damage to the door and steering column.

The Respondent's personal situation also does not support the Department's argument. His $45,000 debt is significant but not extraordinary. This is especially true in light of the fact

that both the Respondent and his wife were gainfully employed at the time, and his in-laws were helping them financially to the extent of buying them a home in the suburbs.

The Department, moreover, did not prove that the Respondent had a net gain from the approximately $5,700 he received from Geico. The Respondent testified that he spent the insurance money on the purchase of a used Honda that was less utilitarian than the Blazer because it could not fit all of his five children.

The Respondent also testified that he had already spent over $1,000 in repairs to the Blazer before it was stolen. The Respondent's investment is inconsistent with the Department's argument that the Blazer's inspection had expired, and that it was in such a poor condition that the Respondent would have wanted to dump it rather than pay to have it pass inspection.

Other circumstances point, at most, equally to innocence as to guilt. The Department argued that the car's recovery location was very close to the Cambria Heights home of the Respondent's in-laws. Thus, it would have been easy for the Respondent to make a quick delivery of the vehicle and walk back to the house. The Respondent testified, however, that the car was stolen from the Richmond Hill location, much further away. Moreover, the Department's own witnesses indicated that the car's location – near the Queens-Nassau border and with highway access to those counties and Brooklyn – was one that a genuine thief might look for.

Finally, the Department points to the Respondent's answer "Yes" to Valerga's question in the Official Department Interview, "Did you falsely report your vehicle stolen?" The Respondent asserted both at the interview and trial that he misinterpreted the question. It would not be the first question he misunderstood in the interview. He was audibly tired throughout the tape (DX-15a), and his attorney interrupted him to remind him to listen to the questions

carefully. In fact, even after Micozzi told the Respondent, "I don't know how much clearer it can get," noted that Valerga "asked you directly and specifically 'did you falsely report your car stolen to this Department' and you answered yes," and demanded "either, you're lying to me now, or you lied then," the Respondent still answered a different question: "No, I, I reported the car stolen sir."

Moreover, at trial, the Department presented the Respondent's "Yes" answer as a proverbial smoking gun. The answer came toward the end of a lengthy interview. It is notable that once the Respondent had supposedly abandoned his previous mien of innocence, the investigators did not seek to ensure that the Respondent meant what they thought he meant. Instead, they asked other, related questions. This Court cannot discard the possibility that the Respondent misheard or misunderstood Valerga's question or just was not listening carefully. Especially because the Respondent retracted the answer a few minutes later, it cannot be relied on as an admission.

It is also worth noting that the Queens District Attorney's Office declined to prosecute this case when Valerga brought it to them. Also, Geico not only rejected Whitaker's suggestion of an Examination Under Oath, but paid the Respondent's claim in its entirety plus expenses, having deemed the Blazer a total loss.

Accordingly, the Respondent is found Not Guilty of Specifications 1 and 2.

Specification Nos. 3 & 4

The third and fourth specifications relate to allegedly false statements made by the Respondent at his Official Department Interview.

Whitaker testified that the "garaging" location, which set the insurance rate, for the Chevy Blazer was changed to North Babylon on April 23, 2005. Whitaker did not know who switched the rate. He stated that the proper procedure to change the rate would be to provide some proof of residence to a customer service representative, like a utility bill. Whitaker had no evidence, however, that such proof of residence was ever provided to Geico.

On March 8, 2006, Geico sent a letter (RX-A) to the "Policyholder," whom it listed as two individuals, Natacha Alexandre and Andre Menzies. The letter stated that a routine underwriting review revealed that the rate change to North Babylon had been "applied in error," and would be changed back to Cambria Heights.

Natacha Menzies, the Respondent's wife, testified that she had "happened to call" Geico, "inquiring about something else." But she mentioned the new home and wanted to know about "changing over." Natacha said that the Geico agent said that if she was moving to Suffolk County, the insurance company could give the Menzies's a better rate, and "Since you're moving in, we will switch it right now." She denied providing any proof of their North Babylon status.

In the Official Department Interview, Valerga asked the Respondent if he "ever put an insurance policy using, utilizing" the North Babylon address. He answered, "Yes." He explained that Natacha:

> was contacted by Geico and Geico made a mistake and put our insurance in that location and, when it all came back they let, my wife spoke to Geico and told Geico that the insurance the lady that that gave us the insurance policy. She said, because we because that was our residence, and we're going to move there. That she automatically put the insurance there. So, I don't know, I don't know what happened and my wife called them back and they wound up switching it back to 120-34 230th Street.

In their written summation, the Department claims (p. 19) that the Respondent's assertion of "mistake" between his wife and Geico was false, and that the rate switch was "a deliberate act

on *Respondent's* part to save money on auto insurance" (emphasis in original). The fact is, however, that aside from accumulating suspicious circumstances, the Department presented nothing to prove this assertion. It is not even clear when the Respondent knew that he was receiving insurance based on the North Babylon address. Whitaker testified that one could not know, just by looking at the insurance card, what address was being used for rating purposes, as opposed to just a mailing address. Both Natacha and the Respondent testified that they were changing mailing addresses to North Babylon in order to establish residency for their children's schooling.

The Department points (id.) out an alleged inconsistency by the Respondent in that he asserted that his wife handled the car insurance, but knew to put down the North Babylon address on the Vehicle Theft Questionnaire (DX-5) sent to him by Whitaker. The Respondent logically explained, however, that he used what was written on the insurance card. The Court notes that the section with the North Babylon address is labeled "Policyholder / Owner Information." It makes sense that the Respondent would have been looking at his card while writing down this information.

In sum, there is no evidence that the rate change to North Babylon was anything other than a mistake on Geico's part once Natacha Menzies told them the family was moving. In fact, even if the Menzies's realized they were getting a better insurance rate than if the Blazer was rated in Queens, the Respondent's assertion at the Official Department Interview of a Geico "mistake" would not be false. As such, the Court judges him Not Guilty of Specification 3.

In Specification 4, the Respondent is charged with impeding a Department investigation by falsely stating at his interview that he did not "enter" the Blazer while it was vouchered at the

105 Precinct. Because under no interpretation of the interview can the Respondent's statements be called impeding, the Court finds him Not Guilty.

The word "enter" is not mentioned during the particular part of the interview when the Respondent is asked about his inspection of the Blazer at the 105 Precinct. Lieutenant Micozzi asked, "Did you go inside the car?," and the Respondent answered, "No, I just looked in the car I didn't go inside the car." Valerga asked if he was sure, and the Respondent maintained, "I looked inside, I opened the door, and I looked inside."

Valerga then told the Respondent, "Yeah fine I have tapes right here. From the 105 Precinct." Valerga admitted at trial that the tapes were not of what he intimated they were of, and that he was "[b]asically" using them as a ploy to trick the Respondent into an admission. Nevertheless, the Respondent said, "Okay . . . . I went inside." Valerga asked again, "Did you go inside the car?," and the Respondent answered, "Yes."

The Court does not need to decide the issue of whether "entering" or "going inside" a vehicle means sitting down in the seat, as opposed to just opening the door and sticking one's head in to examine the interior. That is because Valerga's ruse worked perfectly. Immediately after stating that he did not "go inside" the Blazer, but only "opened the door" and "looked inside," the Respondent admitted that he did "go inside" the vehicle. In no way, therefore, can it be said that the Respondent's original answer prevented or interfered with the Department's investigation. The most that can be said for the Department on this specification is that the Respondent's first response was incomplete, and that Valerga clarified the point. As such, the Respondent is found Not Guilty of Specification 4.

Specification No. 5

This specification charges the Respondent with wrongfully receiving a cheaper insurance rate on the Chevy Blazer by having Geico rate the car based on the North Babylon address, instead of either the Queens addresses. The specification suffers from a similar deficiency in proof as Specification 3. The Department never proved that anyone other than Natacha Menzies made the switch to North Babylon. See, e.g., *Disciplinary Case No. 74613/99* (Respondent credibly testified that he was unaware it was illegal to have an insurance policy in his cousin's name). Further, the Department never proved when the Respondent found out that his Blazer was rated for North Babylon, as opposed to the mere fact that the Menzies's had listed that home with Geico as a mailing address. Again, Whitaker testified that one could not determine the rating address just by looking at the insurance card. In other words, it was not proved that the Respondent knew that, between April 2005 and March 2006, he was receiving an insurance rate based on a Long Island address. Accordingly, he is found Not Guilty of Specification 5.

Specification No. 6

The sixth specification charges that the Respondent failed to notify his Commanding Officer of a change in address by submitting form PD 451-021, titled Change of Name, Residence or Social Condition. The Patrol Guide directs that this form be filed when there is a change in a Department member's name, residence, social condition, or telephone number. *Patrol Guide* § 203-18 (3).

The Change of Name, Residence or Social Condition is used to inform various units of the Department of a change in a Department member's address and other details. One copy is sent to the Personnel Orders Section, and others are sent to the member's old and new residential

precincts (other arrangements are made if the member lives outside New York City). The form speaks of "former" and "new" residences, and there is a space for one address under "from," and one address under "to." Thus, the Change of Name, Residence or Social Condition contemplates that a member can only have one residence at a time.

At trial, the Respondent asserted that he "did document" the Cambria Heights home on his ten-card. The ten-card, or Force Record, refers to form PD 406-143. Instead of recording personal details for various parts of the Department, the Force Record is kept by the member's command. It records assignments, promotions, firearms, equipment, and other job-related qualifications of the member. It also lists the member's address. In an analogous part of the Change of Name, Residence or Social Condition, the Force Record has a space of the "Date of Change" of the residence. Accordingly, like the Change of Name, Residence or Social Condition, the Force Record also contemplates that a member can only have one residence at any given time.

Because the Respondent changed his residence from the Richmond Hill home to the Cambria Heights home on the Force Record, he was also required to file a copy of the Change of Name, Residence or Social Condition documenting that same change of residence. In fact, a copy of the Change of Name, Residence or Social Condition is supposed to be attached to the Force Record at the member's command. As such, he is found Guilty.

Specification No. 7

The seventh specification charges the Respondent with being out of residence while sick on March 22, 2006. On that day, Valerga advised Sergeant Rosenthal of the Medical Division's Absence Control and Investigation Unit that he was conducting an internal investigation, and

asked that Rosenthal visit the Respondent's residence. At about 10:15 a.m., Rosenthal went to the Richmond Hill address because that was the address the Respondent had listed with the Sick Desk when his sick leave commenced. The Respondent was not present.

Upon checking, Rosenthal found that the Respondent had at some point changed his address with the Sick Desk to the Cambria Heights residence. At approximately 11:00 a.m., Rosenthal arrived at the Cambria Heights home. A black woman answered the door but refused to speak with Rosenthal. Several minutes later, Rosenthal received a telephone call from his supervisor, who informed him that the Respondent had just called to explain that he had been out of residence since 7:30 a.m. that day for a doctor's appointment.

Rosenthal stated that the Respondent did not put himself in the Out-of-Residence Log before leaving home, and did not know if he had been granted a pass to be out of residence.

The Respondent's testimony differed in some elements, but was much the same. He stated that he called the Sick Desk at 7:30 a.m. that day to let them know that he was leaving his sick residence to go to a CAT scan appointment. The Respondent left his Cambria Heights house earlier than necessary because he originally thought the appointment was at 12:00 p.m. However, when he realized that it was not until 1:00 p.m., he returned home and waited until 11:00 a.m. to leave again for the doctor's office. The Respondent claimed that he did not call the Sick Desk before leaving home this second time because his cell phone battery was dead at the time. He contended that his phone was working again when his mother called him to let him that someone was looking for him, and he re-called the Sick Desk. The reason the Respondent gave at trial for not calling the Sick Desk from his in-laws' landline telephone at Cambria Heights was that he "never, ever" uses the landline there – he "just [did]n't use their phone."

The Court credits Rosenthal's testimony that the Respondent did not put himself in the Out-of-Residence Log. If he had, Rosenthal would not have been looking for him that whole morning. The Respondent was thus out of residence without permission from approximately 7:30 a.m. to 11:00 a.m., more than the 2 ½ hours charged in the specification. The Respondent's claimed excuses for not calling the Sick Desk – that his cell phone died yet miraculously worked when his mother called to warn him, and the mysterious prohibition on using the Cambria Heights landline – are not credible. Micozzi's suggestion at the Official Department Interview – that the Respondent only called once he got caught – is the likelier scenario. Accordingly, the Court finds the Respondent Guilty of Specification 7.

Specification No. 8

The final specification charges the Respondent with using his parking placard not in his Chevy Blazer, for which the placard was authorized, but in a different vehicle. Valerga testified that the Respondent admitted in his interview that he used the placard in other vehicles. At trial, the Respondent also admitted doing so, even though the placard had the Blazer's license plate number written on it. The Respondent contended that when he drove a different vehicle to work, he would tell either the Desk Officer or ICO which car the placard was in.

The reason the license plate number for which the placard is assigned is written on the placard, and why the placards are given out by ICOs, is to prevent abuse. Indeed, a parking enforcement officer, upon observing the Respondent's placard in another one of his vehicles, might well think that abuse, or even theft, had taken place. As such, the Respondent's conduct was contrary to the good order, efficiency and discipline of the Department, and the Court finds him Guilty of Specification 8.

PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222, 240 (1974). The Respondent was appointed to the Department on July 1, 2001. Information from his personnel folder that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Respondent has been found Guilty in Specifications 6 through 8 of not keeping the Department updated as to a change of residence, leaving his sick residence without prior permission, and using his parking placard in a vehicle for which he was not assigned. These infractions could be viewed by some as minor, technical infractions. Taken cumulatively, however, they reflect a certain carelessness toward Department regulations whose purpose is not only to prevent abuse but to ensure that the Department knows where its members are in case of emergency.

With regard to a penalty recommendation, the Court notes, nonetheless, that the Respondent's infractions do not appear to have been abusive. His absence from his residence while sick was for a good reason, a doctor's appointment. Also, he did not allow any unauthorized persons to use his parking placard.

Under the totality of the circumstances, the Court recommends a penalty of a forfeiture of 10 vacation days. Compare, e.g., *Disciplinary Case No. 70788/96* (7-year member with no prior disciplinary record and average performance evaluation forfeited 20 vacation days for being out of residence while on sick report and failing to report to the sick desk as required) with *Disciplinary Case No. 72395/97* (8-year officer with no prior disciplinary record was warned and

admonished for being out of residence while on sick report; Respondent pleaded guilty, but testified in mitigation of penalty that he had left his residence because his grandmother was about to have emergency surgery and he had to go to the hospital).

Respectfully submitted,

David S. Weisel
Assistant Deputy Commissioner – Trials